

KEYWORD: Financial; Personal Conduct; Criminal Conduct

DIGEST: Applicant has a history of delinquent debts that he and his wife accrued during a period they were essentially unemployed and didn't address until after the issuance of the SOR. By paying two of the three delinquent debts and working out a payment arrangement with the remaining creditor, he mitigates financial concerns associated with his delinquent debts. He also successfully refutes allegations of criminal conduct. However, he is unable to mitigate the omission of his debt delinquencies and criminal charges in his executed security clearance application (SF-86) under any of the pertinent mitigation guidelines. Applicant's knowing and wilful omissions raise continuing security concerns about his judgment and reliability. Clearance is denied.

CASENO: 03-04749.h1

DATE: 09/21/2004

DATE: September 21, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04749

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Eric C. Borgstrom, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of delinquent debts that he and his wife accrued during a period they were essentially unemployed and didn't address until after the issuance of the SOR. By paying two of the three delinquent debts and working out a payment arrangement with the remaining creditor, he mitigates financial concerns associated with his delinquent debts. He also successfully refutes allegations of criminal conduct. However, he is unable to mitigate the omission of his debt delinquencies and criminal charges in his executed security clearance application (SF-86) under any of the pertinent mitigation guidelines. Applicant's knowing and wilful omissions raise continuing security concerns about his judgment and reliability. Clearance is denied.

### **STATEMENT OF CASE**

On November 10, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on December 17, 2003, and requested a hearing. The case was assigned to me on May 5, 2004, and was scheduled for hearing on June 4, 2004. A hearing was convened on June 4, 2004, for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on three witnesses (including himself) and ten exhibits. The transcript (R.T.) of the proceedings was received on June 15, 2004.

### **PROCEDURAL ISSUES**

Before the close of the hearing, Department Counsel moved to amend the SOR as follows: subparagraph 1.b to substitute the word Associates for Asspocoates and subparagraphs 2.s through h 2.3 to substitute the date of April 2002 for April 2003 (R.T., at 23-24). There being no objections from Applicant, and good cause being shown, Department Counsel's amendment motions were granted. Applicant was permitted to answer subparagraph 3.a, which he did not address in his response. Upon clarification of the allegation (*viz.*, that it was intended to address the underlying conduct pertaining to the arrests and charges referenced in subparagraphs 2.c through 2.e), Applicant admitted the arrests but denied doing anything wrong with respect to the conduct covered by the arrests (R.T., at 31-35).

### **SUMMARY OF PLEADINGS.**

Under Guideline F, Applicant is alleged to have accumulated three delinquent debts: one with creditor 1 for \$2,061.00, one with creditor 2 for \$3,820.00, and another with creditor 3 for \$7,468.00.

Under Guideline E, Applicant is alleged to have falsified his SF-86 of April 2002 by failing to disclose (a) his debts over 180 days delinquent, (b) his debts over 90 days delinquent, (c) a felony theft charge of November 2000 (*nolle proessed*), (d) a domestic battery/assault charge of November 2000 (dismissed) and (e) a contributing to the delinquency of juveniles charge. The same alleged omissions are incorporated under Guideline J.

For his response to the SOR, Applicant admitted each of his debts, but denied falsifying his SF-86. He added an explanation to the contributing to the delinquency of juveniles charge, which he claimed to have followed a 1972 arrest of Applicant and four of his fellow soldiers on a weekend pass from a nearby Army training center, which to his claimed knowledge never resulted in charges.

### **FINDINGS OF FACT**

Applicant is a 53-year-old analyst for a defense contractor who seeks a security clearance. The allegations covered in the SOR, and admitted to by Applicant, are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant and his wife experienced financial difficulties for several years following his move to his current state in 1999 to help look after his mother-in-law. Both Applicant and his spouse gave up their jobs in another state to make the move (*see ex. 3*; R.T., at 55-57). When neither could find comparable work they let some of their debts slide: among them

were creditors 1 through 3. Between 2000 and 2003, neither Applicant nor his spouse made any payments on these debts. While Applicant generally relied on his wife to pay incoming bills, he remained aware that his wife was not paying on any of his debts listed in the SOR (*see* ex. 3; R.T., at 90-91).

Since receiving the SOR, Applicant has taken steps to resolve his delinquent debts. He provides documentation of satisfying both his creditor 1 and creditor 2 debts in full (*see* exs. A and B). Under a payment arrangement he made with creditor 3 in February 2004, he has authorized bi-weekly automatic withdrawals from his personal bank account of \$150.00 (*see* ex. C; R.T., at 81-84). Through these bi-weekly payments he has been able to reduce the overall creditor 3 debt to about \$5,500.00 and hopes to pay off the entire amount by the end of 2005, if not sooner (R.T., at 66-68, 81-84 and 127).

In 1972, Applicant and four of his fellow soldiers from a local Army training facility had a weekend pass and traveled to a nearby city for a brief retreat. While in an adjoining room in a local hotel with two of his fellow soldiers, he received a knock at the door from a police detective investigating a report of housing females in his room. Finding no females in Applicant's room, the detective checked the adjoining room where the other two soldiers were staying and found females in this room. Applicant and his fellow soldiers were then driven to the local jail for questioning. Altogether, they spent about two weeks in jail while the investigation proceeded and charges of contributing to the delinquency of a minor were filed. Once the investigation was concluded, Applicant and his two roommates were cleared to return to their unit, which they did. The charges, in turn, appear to have been dismissed, or otherwise satisfactorily disposed of in Applicant's favor. Believing he was never charged with any offense, Applicant assumed there was nothing of record about this incident. He was mistaken: His arrest and charge were reported to the FBI who identified the arrest and charge in their official records and is covered by a 1973 CID investigation report (*compare* exs. 4 and 7 with R.T., at 53-55 and 94-95).

In November 2000, Applicant was working as an assistant manager for a local chain restaurant when he took home some food items in the freezer that were earmarked for disposal. Based on past experience, he believed he had the implicit approval of the manager to appropriate these old food items home with him. When the new district manager found out about it, she tried to fire not only his manager but Applicant as well. She then filed charges with the local police department accusing him of second degree theft (a felony). The case was *nolle prossed* in July 2001 upon Applicant's payment of \$303.48 in restitution and \$383.00 in court costs (*see* ex. 6; R.T., at 57-60, 101-03).

During a quarreling incident with his spouse in November 2000 over his threats to leave her, Applicant's spouse jumped into the back of his truck, fell out, and bruised herself. Later, she called the police who pulled him over and arrested him for domestic assault and battery. After pleading no contest to the charges in January 2001, he was ordered to pay court costs, attend pretrial intervention and observe conditioned contact with his spouse (subject to her signing an affidavit of consent). The charges against him were dismissed in March 2001 (*see* ex. 5; R.T., at 105-08).

When answering questions 38 and 39 of his April 2002 SF-86, Applicant answered in the negative to having any debts over 180 and 90 days delinquent. He initially attributed his omissions to reliance on his wife to pay his debts and his corresponding lack of knowledge that the three listed debts were delinquent. Applicant acknowledged at hearing,

though, to being aware that the three debts in issue were not addressed before receiving the SOR in November 2003 (R.T., at 97-99). Hearing acknowledgments are reinforced by his acknowledgments in his May 2002 DSS statement to having paid nothing on his listed debts since 2000 (*see ex. 3*). Based on his acknowledgments he cannot avert inferences his omissions were knowing and wilful.

Applicant also omitted his 1972 contributing to the delinquency of juveniles charge from his answer to question 21 in his April 2002 SF-86. After initially expressing a lack of knowledge any such contributing to the delinquency of juveniles charge being filed against him in 1972, he changed his position at hearing, acknowledging awareness of the filed charges amidst his belief the charges would not be of record (R.T., at 114-21). A belief that filed charged would not be in any public record for the government to access is much different than having no knowledge of any arrest or charges. Such admitted knowledge is enough to warrant drawn inferences of knowing and wilful concealment by Applicant.

In answering question 21 of his SF-86, Applicant also omitted his 2000 theft and domestic battery charges. Just as with his 1972 delinquency of juvenile charge, Applicant did not simply misread the question, but rather omitted these charges in the belief they were not reported and likely would not be uncovered by DSS investigators (R.T., at 114-21). Applicant's omissions were the result of his knowing and wilful decision to avert disclosure of the charges, and not by any mistaken confusion or inadvertent memory loss.

When interviewed by a DSS agent in May 2002, Applicant disclosed both his listed debts when shown his credit report and two of his prior charges (*i.e.*, 1972 contributing to the delinquency of a minor charge and his 2000 theft charge) when asked about them. However, he did not disclose his assault and domestic battery charges until confronted by the same DSS agent in a second interview conducted in July 2002.

Applicant is highly regarded by his supervisor, coworkers, and representatives of the military customer he interfaces with as a reliable and trustworthy military analyst who can always be counted upon to contribute his wealth of skills and experience to ensure the successful completion of the missions he is assigned to (*see ex. D*; R.T., at 139-40). Both his performance evaluations and quarterly counseling reports attest to his superior contributions to his military training team (*see exs. D and E*). None of his references, however, were informed by Applicant of all of the charges filed against him since 1972 and his omissions of the same from his SF-86 (*see ex. D*; R.T., at 113).

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could

raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Financial Considerations**

*The Concern:* An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

### **Disqualifying Conditions**

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

### **Mitigating Conditions**

MC 6. The individual initiated good-faith efforts to repay overdue creditors or otherwise resolve debts.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Disqualifying Conditions:**

DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status,

determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

**Mitigating conditions:** None.

**Criminal Conduct**

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

**Disqualifying Conditions:**

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

## **Mitigating Conditions:**

MC 4 The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

MC 6 There is clear evidence of successful rehabilitation.

## **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the SOR and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **CONCLUSION**



Applicant accrued considerable delinquent debt in 1999 during a period when both he and his wife were in a new state without work. Altogether, Applicant and his wife accumulated over \$13,000.00 of personal debts. The Government's security concerns center on the amount of delinquent debt he compiled in 1999 and allowed to become delinquent and his ensuing omissions of those debts, along with filed criminal charges against him, from his pertinent answers to his April 2002 SF-86.

## **Financial Issues**

Applicant's accumulated debts involve debts he and his wife accumulated after they had left their jobs in another state to move to their current state to care for his mother-in-law and couldn't find work. Each of these debts became delinquent after Applicant and his wife stopped paying on them for a three year period spanning 2000 and 2003. On this record, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

While the three listed delinquent debts of Applicant are extenuated to some extent, extenuation is not enough in and of itself to overcome the adverse trust implications associated with his accumulating these delinquent debts without any evidence of addressing them until he received the SOR. Since receiving the SOR, Applicant has paid two of the debts in full and worked out a satisfactory payment arrangement with the third creditor.

Applicant mitigates active security concerns associated with his debt problems by his payment of two of his debts and his arrangement of a payment plan with the third creditor that he provides documented payments on. Appraising Applicant's extenuating circumstances with respect to all of his covered debts, Applicant may take advantage of MC 3 (conditions largely beyond the person's control) of the Adjudicative Guidelines to extenuate his debt delinquencies. He may also avail himself of the mitigation benefits of MC 6 (initiated good-faith effort to repay overdue creditors) based on his repayment efforts.

Taking into account all of the circumstances of Applicant's accumulated debts and the good- faith efforts he demonstrated in satisfying his debts when he and his wife were able to with the aid of his father-in-law, favorable conclusions warrant with respect to subparagraphs 1.a through 1.c as to the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

## **Falsification issues**

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance

are the timing and circumstances of Applicant's multiple omissions of his debts and recorded criminal charges filed in 1972 and 2000, respectively, from his April 2002 SF-86.

By omitting his debts delinquent for over 180 and 90 days, respectively, and filed criminal charges before being confronted in ensuing DSS interviews, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. He makes no claim of misunderstanding the questions, which were posed in a straightforward way in the questionnaire, and acknowledges awareness of both his debts and his filed criminal charges before executing his 2002 SF-86.

Applicant's omissions were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of DC 2 (falsification of a security questionnaire) and DC 3 (falsification of information provided in an interview) for personal conduct of the Adjudicative Guidelines.

Mitigation is difficult to credit Applicant with, since he failed to voluntarily alert DSS to his omissions before being confronted with the adverse information about his delinquent debts and his criminal arrests/charges in his May 2002 DSS interview, and again in his follow-up July 2002 DSS interview about a previously undisclosed 2000 domestic assault charge. Not only has the Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of DSS interview opportunities to voluntarily disclose omitted adverse information. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

There can be no doubt but that Applicant has inspired confidence and trust among his defense contractor supervisor and co-workers. But in the face of his material omissions of security significant information, his favorable character evidence alone is not enough to absorb security concerns extant with the Government over his failure to be truthful through both his SF-86 submissions and his recorded DSS interviews. *See* ISCR Case No. 01-25466 (July 2004). Mitigation is further weakened by the lack of knowledge of his character witnesses of all of the charges filed against him since 1972 and his omissions of the same from his SF-86.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 2.a through 2.e of Guideline E.

### **Criminal coverage of conduct underlying falsification issues**

While not a model of clarity, the underlying conduct covered in the falsification allegations reflect separate allegations of criminal conduct governed by Guideline J. That none of the covered arrests and charges resulted in a criminal conviction is not dispositive. The Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Still, without denying the circumstances surrounding the underlying allegations that gave rise to the respective criminal arrests and charges covered by subparagraphs 2.c through 2.e, Applicant insists he did nothing legally wrong. Absent either admissions from Applicant or more probative proof of guilt than has been presented in the record, inferential proofs of probable guilt cannot be drawn. Based on a full review of the evidence and drawn inferences from the developed record, favorable conclusions warrant with respect to subparagraph 3.a of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

**GUIDELINE F (FINANCIAL): FOR APPLICANT**

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

**GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT**

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

Sub-para. 2.e: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

**DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge